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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 JAMES E. ROJO,
12 CDCR #J-53355,

13 Plaintiff,

14
15 vs.

16 R.J. DONOVAN STATE PRISON;
17 SMITH, Correctional Officer; JONES,
18 Correctional Officer; D. PARAMO,
19 Warden; A. HERNANDEZ, Deputy
20 Warden; DIRECTOR/SECRETARY,
21 California Department of Corrections,

22 Defendants.

Civil No. 13cv2237 LAB (BGS)

**ORDER DISMISSING FIRST
AMENDED COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO
28 U.S.C. §§ 1915(e)(2)
AND 1915A(b)**

23 **I. PROCEDURAL HISTORY**

24 On May 8, 2013, James E. Rojo ("Plaintiff"), a state prisoner currently
25 incarcerated at the Richard J. Donovan Correctional Facility ("RJD") located in San
26 Diego, California and proceeding pro se, initiated this civil action pursuant to 42 U.S.C.
27 § 1983 in the Northern District of California.

28 On September 17, 2013, United States District Judge William H. Orrick
determined that because Plaintiff's claims arose at RJD, venue was proper in the

1 Southern District of California and transferred the matter here pursuant to 28 U.S.C.
 2 §§ 84(d), 1391(b) and 1406(a) (ECF Doc. No. 8). Judge Orrick did not rule on Plaintiff's
 3 Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) (ECF
 4 Doc. No. 6), nor did he screen Plaintiff's Complaint pursuant to 28 U.S.C. § 1915(e)(2)
 5 or § 1915A prior to transfer.

6 This Court granted Plaintiff's Motion to Proceed IFP and simultaneously
 7 dismissed his Complaint for failing to state a claim upon which relief could be granted
 8 pursuant to 28 U.S.C. § 1915(e)(2) & 1915A(b). (ECF Doc. No. 11 at 8-9.) Plaintiff
 9 was granted leave to file an Amended Complaint in order to correct the deficiencies
 10 identified in the Court's Order. (*Id.*) Plaintiff has now filed his First Amended
 11 Complaint ("FAC"). (ECF Doc. No. 13.)

12 **II. INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) AND 1915A(b)(1)**

13 As the Court stated in the previous Order, notwithstanding IFP status or the
 14 payment of any partial filing fees, the Prison Litigation Reform Act ("PLRA") obligates
 15 the Court to review complaints filed by all persons proceeding IFP and by those, like
 16 Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced
 17 for, or adjudicated delinquent for, violations of criminal law or the terms or conditions
 18 of parole, probation, pretrial release, or diversionary program," "as soon as practicable
 19 after docketing." See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions
 20 of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
 21 which are frivolous, malicious, fail to state a claim, or which seek damages from
 22 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v.*
 23 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*
 24 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

25 "[W]hen determining whether a complaint states a claim, a court must accept as
 26 true all allegations of material fact and must construe those facts in the light most
 27 favorable to the plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also*
 28 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2)

1 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). However, while
 2 a plaintiff’s allegations are taken as true, courts “are not required to indulge unwarranted
 3 inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal
 4 quotation marks and citation omitted). Thus, while the court “ha[s] an obligation where
 5 the petitioner is pro se, particularly in civil rights cases, to construe the pleadings
 6 liberally and to afford the petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d
 7 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir.
 8 1985)), it may not, in so doing, “supply essential elements of claims that were not
 9 initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268
 10 (9th Cir. 1982). “Vague and conclusory allegations of official participation in civil
 11 rights violations” are simply not “sufficient to withstand a motion to dismiss.” *Id.*

12 **A. 42 U.S.C. § 1983**

13 “Section 1983 creates a private right of action against individuals who, acting
 14 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*
 15 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of
 16 substantive rights, but merely provides a method for vindicating federal rights elsewhere
 17 conferred.” *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (internal quotation marks
 18 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)
 19 deprivation of a right secured by the Constitution and laws of the United States, and (2)
 20 that the deprivation was committed by a person acting under color of state law.” *Tsao v.*
 21 *Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

22 **B. Defendant RJ Donovan State Prison**

23 Once again, the Court finds that to the extent Plaintiff names R.J. Donovan State
 24 Prison as a Defendant, his claims must be dismissed sua sponte pursuant to both
 25 U.S.C. § 1915(e)(2) and § 1915A(b) for both failing to state a claim and for seeking
 26 damages against a defendant who is immune. R.J. Donovan, a state prison within the
 27 jurisdiction of the State of California’s Department of Corrections and Rehabilitation
 28 (“CDCR”), is not a “person” subject to suit under § 1983. *Hale v. State of Arizona*, 993

1 F.2d 1387, 1398–99 (9th Cir. 1993) (holding that a state department of corrections is an
 2 arm of the state, and thus, not a “person” within the meaning of § 1983). And if by
 3 naming R.J. Donovan, Plaintiff really seeks to sue either the CDCR or the State of
 4 California itself, his claims are clearly barred by the Eleventh Amendment. *See Alabama*
 5 *v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) (“There can be no doubt . . . that [a] suit
 6 against the State and its Board of Corrections is barred by the Eleventh Amendment,
 7 unless [the State] has consented to the filing of such a suit.”).

8 Therefore, to the extent Plaintiff seeks monetary damages against R.J. Donovan
 9 State Prison, his Complaint is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), (iii)
 10 and 28 U.S.C. § 1915A(b)(1) & (2).

11 **C. Respondeat Superior - Director/Secretary of CDCR & Wardens**

12 Despite the Court’s previous admonitions, Plaintiff once again names the
 13 Director/Secretary of the CDCR, as well as the Warden and a Deputy Warden at RJD as
 14 Defendants, but his First Amended Complaint contains virtually no allegations that any
 15 of these individuals knew of or took any part in any constitutional violation. “Because
 16 vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each
 17 government-official defendant, through the official’s own individual actions, has
 18 violated the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *see also Jones*
 19 *v. Community Redevelopment Agency of City of Los Angeles*, 733 F.2d 646, 649 (9th Cir.
 20 1984) (even pro se plaintiff must “allege with at least me degree of particularity overt
 21 acts which defendants engaged in” in order to state a claim). Thus, in order to avoid
 22 the respondeat superior bar, Plaintiff must include sufficient “factual content that allows
 23 the court to draw the reasonable inference that the defendant is liable for the misconduct
 24 alleged,” *Iqbal*, 556 U.S. at 678, including personal acts by each individual defendant
 25 which show a direct causal connection to a violation of specific constitutional rights.
 26 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). As currently pleaded, however,
 27 Plaintiff’s First Amended Complaint sets forth no facts which might be liberally
 28 construed to support any sort of individualized constitutional claim against the

1 Director/Secretary of the CDCR, Warden Paramo, or Deputy Warden Hernandez.
 2 Therefore, the Court finds Plaintiff has failed to state a claim against any of them
 3 pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). *See Lopez*, 203 F.3d at 1126-27;
 4 *Resnick*, 213 F.3d at 446.

5 **D. Due Process**

6 Plaintiff alleges that he “had to spend three months in [Administrative
 7 Segregation] for something which was never proven or even verified.” *See* FAC at 4.
 8 The Due Process Clause protects Plaintiff against the deprivation of liberty without the
 9 procedural protections to which he is entitled. *Wilkinson v. Austin*, 545 U.S. 209, 221
 10 (2005). To state a due process claim, Plaintiff must first identify the interest at stake. *Id.*
 11 at 221. Liberty interests may arise from the Due Process Clause itself or from state law.
 12 *Id.*

13 The Due Process Clause by itself does not confer on inmates a liberty interest in
 14 avoiding more adverse conditions of confinement, and under state law, the existence of
 15 a liberty interest created by prison regulations is determined by focusing on the nature
 16 of the condition of confinement at issue. *Id.* at 221-23 (citing *Sandin v. Conner*, 515
 17 U.S. 472, 481-84 (1995)) (quotation marks omitted). Liberty interests created by prison
 18 regulations are generally limited to freedom from restraint which imposes “atypical and
 19 significant hardship” on the inmate “in relation to the ordinary incidents of prison life.”
 20 *Id.* at 221 (citing *Sandin*, 515 U.S. at 484); *Myron v. Terhune*, 476 F.3d 716, 718 (9th
 21 Cir. 2007).

22 In this case, Plaintiff has failed to establish a liberty interest protected by the
 23 Constitution because he has not alleged, as he must under *Sandin*, sufficient facts related
 24 to the conditions in Ad-Seg which show “the type of atypical, significant deprivation
 25 [that] might conceivably create a liberty interest.” 515 U.S. at 486. For example, in
 26 *Sandin*, the Supreme Court considered three factors in determining whether the plaintiff
 27 possessed a liberty interest in avoiding disciplinary segregation: (1) the disciplinary
 28 versus discretionary nature of the segregation; (2) the restricted conditions of the

1 prisoner's confinement and whether they amounted to a "major disruption in his
2 environment" when compared to those shared by prisoners in the general population; and
3 (3) the possibility of whether the prisoner's sentence was lengthened by his restricted
4 custody. *Id.* at 486-87.

5 Therefore, to allege a due process violation, Plaintiff's First Amended Complaint
6 must contain sufficient "factual content that allows the court to draw the reasonable
7 inference" that his stay in Ad-Seg imposed an atypical and significant hardship on him
8 in relation to the ordinary incidents of prison life. *Iqbal*, 556 U.S. at 678; *Sandin*, 515
9 U.S. at 483-84. Plaintiff's Complaint, however, fails to include any "further factual
10 enhancement" which might suggest any major disruption in his environment, any
11 comparison to the conditions of his previous confinement in the general population, or
12 any mention whatsoever as to its potential effect on the length of his sentence. *See Iqbal*,
13 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556); *Sandin*, 515 U.S. at 486-87. Plaintiff
14 must offer more than "naked assertions devoid of further factual enhancement" in order
15 to state a due process claim; and instead must include "sufficient factual matter," *id.*,
16 which demonstrates "a dramatic departure from the basic conditions" of his confinement
17 that would give rise to a liberty interest before he can claim a violation of due process.
18 *Sandin*, 515 U.S. at 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996),
19 *amended by* 135 F.3d 1318 (9th Cir. 1998). This he has failed to do; therefore the Court
20 finds that Plaintiff has failed to allege a liberty interest in remaining free of Ad-Seg, and
21 thus, has failed to state a due process claim. *See May v. Baldwin*, 109 F.3d 557, 565 (9th
22 Cir. 1997) (concluded that prisoners have no liberty interest in remaining free from
23 administrative segregation or solitary confinement); *Toussaint v. McCarthy*, 801 F.2d
24 1080, 1091 (9th Cir.1985) (finding that administrative segregation is the type of
25 confinement that should be reasonably anticipated by inmates at some point in their
26 incarceration), *abrogated in part on other grounds by Sandin*, 515 U.S. 472; *see also*
27 *Myron*, 476 F.3d at 718 (finding no "atypical and significant deprivation" where prisoner

28 / / /

1 failed to allege conditions at level IV prison differed significantly from those at a level
2 III prison).

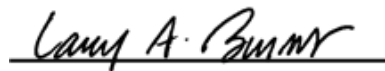
3 Accordingly, the Court finds Plaintiff's First Amended Complaint fails to state a
4 due process claim as to any named Defendant upon which relief can be granted pursuant
5 to 28 U.S.C. § 1915(e)(2) and § 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*,
6 213 F.3d at 446.

7 **III. CONCLUSION AND ORDER**

8 Good cause appearing, **IT IS HEREBY ORDERED** that:

9 Plaintiff's First Amended Complaint is **DISMISSED** without prejudice for failing
10 to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However,
11 Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is filed in
12 which to file a Second Amended Complaint which cures all the deficiencies of pleading
13 noted above. Plaintiff's Amended Complaint must be complete in itself without
14 reference to his original pleading. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc.*
15 *v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) ("[A]n amended
16 pleading supersedes the original."); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)
17 (citation omitted) ("All causes of action alleged in an original complaint which are not
18 alleged in an amended complaint are waived.").¹

19
20 DATED: April 21, 2014



21 **HONORABLE LARRY ALAN BURNS**
22 United States District Judge

23
24 ¹ Finally, Plaintiff is cautioned that should his Amended Complaint still fail to state a
25 claim upon which relief may be granted, it may be dismissed without further leave to amend and
26 may hereafter be counted as a "strike" against him pursuant to 28 U.S.C. § 1915(g). *See*
27 *McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996). "Pursuant to § 1915(g), a prisoner
28 with three strikes or more cannot proceed IFP." *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th
Cir. 2005). "Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which
were dismissed on the ground that they were frivolous, malicious, or failed to state a claim," *id.*
(internal quotations omitted), "even if the district court styles such dismissal as a denial of the
prisoner's application to file the action without prepayment of the full filing fee." *O'Neal v.*
Price, 531 F.3d 1146, 1153 (9th Cir. 2008).